IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2002-0155
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
AUDRA JEAN TALMADGE,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-48365

Honorable Charles S. Sabalos, Judge

REVERSED AND REMANDED

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E C K E R S T R O M, Presiding Judge.

¶1 Appellant Audra Talmadge was convicted after a jury trial of two counts of child abuse of a person under age fifteen under circumstances likely to produce death or serious injury, both class two felonies, and nine counts of child abuse, non-death or serious injury, class four felonies. The court sentenced her to mitigated, consecutive ten-year sentences on the first two counts and suspended the imposition of sentence, placing her on concurrent terms of lifetime probation, on the remaining counts. She raises nine issues on appeal, contending, *inter alia*, that the trial court erroneously instructed the jury on the elements of child abuse and erred when it refused her request for an instruction on the lesser-included offenses of reckless and negligent child abuse. We agree that the trial court erred in both respects and therefore reverse.

¶2 Audra and her husband Martin Talmadge were arrested for child abuse in January 1995 after doctors discovered their infant daughter, A., had numerous rib, leg, and skull fractures. The state removed A. from Audra and Martin's home and placed her in foster care. A Pima County grand jury charged the Talmadges with fifteen counts of child abuse. The indictment alleged that counts one, two, and three had been committed under circumstances likely to result in death or serious physical injury, based on A.'s skull fractures. The remaining counts arose from A.'s other fractures and Audra's and Martin's alleged failure to secure medical treatment for all her fractures.

¶3 At their first trial in 1996, the state dismissed count two. The jury acquitted Martin and Audra on counts ten, thirteen, and fourteen and found them guilty of the

remaining eleven counts. But after we affirmed her convictions and sentences, *State v. Talmadge*, No. 2 CA-CR 96-0555 (memorandum decision filed Mar. 12, 1998) (*Talmadge I*), the supreme court vacated our decision and reversed Audra's convictions, concluding the trial court erroneously had precluded her expert witness's surrebuttal testimony on temporary brittle bone disease (TBBD). *State v. Talmadge*, 196 Ariz. 436, 999 P.2d 192 (2000) (*Talmadge II*). Based on this ruling, Martin moved to supplement his petition for post-conviction relief, the trial court granted Martin a new trial, and the two were tried jointly in 2002 on the eleven remaining counts.

¶4 During that trial, both Martin and Audra denied abusing A., contending she suffered from a bone disease, TBBD, that could cause fractures in a baby after normal handling. The jury found Audra and Martin guilty of all charges.

CHILD ABUSE INSTRUCTION

¶5 Audra argues the trial court provided the jury with erroneous, prejudicially ambiguous instructions on the elements of child abuse.[1] Generally, we review *de novo* whether a jury instruction correctly states the law, but review a trial court's refusal to give a requested instruction for an abuse of discretion. *State v. Johnson*, 212 Ariz. 425, ¶ 15, 133 P.3d 735, 741 (2006).

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[1]We note the state responds to this argument as if Audra had argued the instruction was erroneous only as to the first two counts of the indictment. But we find no such limitation in Audra's argument. The state similarly assumes that Audra does not contend she was entitled to lesser-included offense instructions on any but the first two counts. We find no support for this assumption and therefore reject it.

¶6 Preliminarily, the state contends that our review of these issues is precluded by the law of the case doctrine and by Audra's failure to preserve her objection to the child abuse instruction in question. The instruction she now challenges was also given during her first trial. Thereafter, Audra argued in her first appeal, as she does here, that the instruction did not properly clarify that a caregiver must act intentionally or knowingly to be criminally culpable for child abuse. *Talmadge I*, ¶¶ 53-54. At that time, this court concluded the jury had not been misled by the instruction. *Id*. ¶ 55. In this appeal, the state argues this court's previous ruling on that issue is the law of the case and we should not address the issue a second time. *See State v. Waldrip*, 111 Ariz. 516, 518, 533 P.2d 1151, 1153 (1975) (decision of appellate court in prior appeal of same case generally settles law in later appeal). But law of the case is inapplicable when "'an error in the first decision renders it manifestly erroneous or unjust or when a substantial change occurs in essential facts or issues, in evidence, or in the applicable law.'" *State v. Wilson*, 207 Ariz. 12, ¶ 9, 82 P.3d 797, 800 (App. 2004), *quoting Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 278, 279, 860 P.2d 1328, 1331, 1332 (App. 1993).

¶7 We conclude law of the case does not preclude the argument in this appeal. The Arizona Supreme Court vacated our decision in *Talmadge I*. *Talmadge II*, 196 Ariz. 436, ¶ 29, 999 P.2d at 197. Although it did not address the propriety of the child abuse instruction, and it is unclear from the record or *Talmadge II* whether Audra raised the issue and the court declined to review it, we question whether a ruling of this court, once vacated,

albeit on other grounds, can properly be characterized as law of the case. *See Associated Aviation Underwriters v. Wood*, 209 Ariz. 137, ¶ 40, 98 P.3d 572, 585 (App. 2004) (noting decision that had been depublished rather than vacated could still be law of the case). And even assuming an issue decided in a vacated decision could remain law of the case, we do not believe the law of the case doctrine should apply here. In the first appeal, one of our grounds for rejecting Audra's argument that the instruction resulted in reversible error was that the prosecutor's argument had assisted the jury in correctly understanding the necessary elements of the crime of child abuse. As we explain below, the state did not similarly clarify the instructions during the second trial.

¶8 The state also contends Audra waived the arguments she now asserts because she did not object on the same ground below. But Martin objected to the instruction, contending it was "convoluted" and "compound" and that jurors might not be able to understand each element the state was required to establish. Audra joined in that objection. *See State v. Grannis*, 183 Ariz. 52, 56, 900 P.2d 1, 5 (1995) (defendant must either object or join in codefendant's objections to argue issue on appeal). The state contends this in "no way resembles the claim now presented on appeal." We disagree. Audra's claim on appeal—that the instruction's compound construction rendered it ambiguous and could have led the jury to believe the state did not have to prove she had possessed the requisite mental state in order to find her guilty of child abuse—was sufficiently conveyed by the objection made at trial. Even if we were to consider Audra's objection below different than the

argument on appeal, she would be entitled to relief if the trial court committed fundamental, prejudicial error when instructing the jury. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). "Fundamental error is present when a trial judge fails to instruct on matters vital to a proper consideration of the evidence." *State v. Schad*, 142 Ariz. 619, 620, 691 P.2d 710, 711 (1984).

¶9 Section 13-3623, A.R.S., provides as follows:

> A. Under circumstances likely to produce death or serious physical injury, any person who causes a child . . . to suffer physical injury or, having the care or custody of a child . . . who causes or permits the person or health of the child . . . to be injured or who causes or permits a child . . . to be placed in a situation where the person or health of the child . . . is endangered is guilty of an offense as follows:
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> 1. If done intentionally or knowingly, the offense is a class 2 felony and if the victim is under fifteen years of age it is punishable pursuant to § 13-604.01.
>
> 2. If done recklessly, the offense is a class 3 felony.
>
> 3. If done with criminal negligence, the offense is a class 4 felony.

The state charged Audra and Martin with several counts of child abuse, two of which were alleged to have been committed "[u]nder circumstances likely to produce death or serious physical injury." § 13-3623(A). The remaining counts were based on § 13-3623(B), the distinction being that the abuse was alleged to have been committed "[u]nder circumstances *other than those* likely to produce death or serious physical injury." (Emphasis added.) Martin and Audra were charged with intentional or knowing child abuse on all counts.

¶10 The jury was instructed as follows:

> Under circumstances likely to produce death or serious physical injury, any person who intentionally or knowingly causes a child to suffer physical injury or, having the care or custody of such child, causes or permits the person or health of such child to be injured, or causes or permits such child to be placed in a situation where its person or health is endangered is guilty of child abuse.[2]

Audra argues that placement of the clause "intentionally or knowingly" only before the first clause, "caus[ing] a child to suffer physical injury," made the instruction ambiguous; it permitted the jury to find her guilty of child abuse for merely failing to act without finding she had the requisite culpable mental state. Because it is unclear whether the words "intentionally or knowingly" modify the subsequent clause only or each of the three clauses that follow, we agree.

¶11 Based on this instruction, the jury reasonably could have found Audra guilty of child abuse if it concluded she had permitted A.'s health to be endangered—in the absence of any finding she had done so intentionally or knowingly.[3] The instruction essentially permitted the jury to find Audra strictly liable if it found A. had been abused

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[2]As to the lesser counts, the instruction only differed by a few words: the jury was instructed the abuse must have been committed "[u]nder circumstances *other than those* likely to produce death or serious physical injury." (Emphasis added.)

[3]We do not consider the post-verdict statements of three jurors indicating that they drew precisely that erroneous conclusion from the instruction. *See* Ariz. R. Crim. P. 24.1(d), 17 A.R.S. (court cannot consider testimony that "inquires into the subjective motives or mental processes" leading juror to reach verdict).

while Audra had care or custody of the child.[4] Such an interpretation of the instruction would not be a correct understanding of the law. Section 13-3623, read in its entirety, makes clear the *mens rea* applies to all acts of potential child abuse. *See id.* (describing separately the three potential culpable mental states for child abuse and applying them without exception to the *acti rei*); *see also* A.R.S. § 13-202(A) (mental state applicable to all elements unless "contrary legislative purpose plainly appears").

¶12 When an erroneous instruction allows a jury to reach a guilty verdict without necessarily finding every element of the offense, we have not hesitated to reverse the defendant's conviction. *State v. Amaya-Ruiz*, 166 Ariz. 152, 173, 800 P.2d 1260, 1281 (1990) (conviction reversed when improper instruction may have led jury to find defendant guilty of manslaughter without finding he had requisite mental state toward unborn child); *State v. Williams*, 154 Ariz. 366, 368, 742 P.2d 1352, 1354 (1987) (burglary conviction

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[4]Nor are we persuaded that the state's closing arguments clarified the instruction. *See State v. Bruggeman*, 161 Ariz. 508, 510, 779 P.2d 823, 825 (App. 1989) (we may look to closing argument "when assessing the adequacy of jury instructions"). The state simply restated the instruction as follows:

> [U]nder circumstances likely to produce death or serious physical injury, any person who intentionally or knowingly causes a child to, one, suffer physical injury, or, two, having the care and custody of a child causes or permits the health of the child to be injured, which is a little different than actually causing the physical injury, but is rather permitting the child to be injured, or place a child in a situation where its person or health is in danger, which, again, is a separate way of committing child abuse.

reversed when erroneous instruction prevented jury from considering whether defendant was "armed" under meaning given term by court); *see also State v. Johnson*, 205 Ariz. 413, ¶ 25, 72 P.3d 343, 350 (App. 2003) (conviction reversed because jury could have been misled by transferred intent instruction to convict defendant of assault without evidence of requisite intent to place victim in reasonable apprehension of physical injury); *State v. Siner*, 205 Ariz. 301, ¶ 17, 69 P.3d 1022, 1026 (App. 2003) (conviction reversed because of improper transferred intent instruction).

¶13 Audra has established she was prejudiced by the instruction because it permitted the jury to find her guilty without finding every element of the offense had been established. Even assuming Audra would be required to show the jury could have reached another verdict had it been properly instructed in order to establish prejudice, she can do so here. The state presented ample evidence of A.'s injuries, but provided only controvertible, circumstantial evidence that Audra either had caused those injuries or had been aware of their extent or nature. Indeed, portions of the record demonstrate that Audra repeatedly sought medical attention for A. around the time A. was being injured, taking A. to separate physicians on consecutive days when those physicians were not immediately able to identify the cause of the child's discomfort. *See State v. Johnson*, 155 Ariz. 23, 26, 745 P.2d 81, 84 (1987) ("Where there is the possibility that the defendant was convicted [because of] deficient jury instructions, the conviction must be reversed."); *see also State v. Ontiveros*, 206 Ariz. 539, ¶ 19, 81 P.3d 330, 334 (App. 2003) (reversible error when

defendant may have been convicted for nonexistent offense). Accordingly, we reverse Audra's convictions and remand the case for a new trial.

LESSER-INCLUDED OFFENSE INSTRUCTION

¶14 Audra argues the trial court erred when it denied her request for a lesser-included offense instruction for negligent or reckless child abuse. We review a trial court's denial of a requested instruction for an abuse of discretion. *State v. Wall*, 212 Ariz. 1, ¶ 12, 126 P.3d 148, 150 (2006). Rule 23.3, Ariz. R. Crim. P., 17 A.R.S., requires a trial court to submit forms of verdict to the jury "for all offenses necessarily included in the offense charged." An offense is a lesser-included offense "when the 'greater offense cannot be committed without necessarily committing the lesser offense.'" *Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d at 150, *quoting State v. Dugan*, 125 Ariz. 194, 195, 608 P.2d 771, 772 (1980). And a lesser-included offense is a necessarily included offense, requiring that a jury instruction be given, only if "the evidence is sufficient to support giving the instruction." *Id*. "In determining the sufficiency of the evidence necessary to require the giving of a lesser included offense instruction, the question is whether the jury could rationally fail to find the distinguishing element of the greater offense." *State v. Noriega*, 142 Ariz. 474, 481, 690 P.2d 775, 782 (1984), *overruled on other grounds*, *State v. Burge*, 167 Ariz. 25, 804 P.2d 754 (1990).

¶15 The parties do not dispute that negligent and reckless child abuse are lesser-included offenses of intentional and knowing child abuse. *See* § 13-202(C) (element of

criminal negligence established if person acts intentionally, knowingly, or recklessly; recklessness established if person acts intentionally or knowingly). The culpable mental states of intentional and knowing require a person to either purposefully engage in or be aware of conduct described in a criminal statute. *See* A.R.S. § 13-105(9). But "with respect to a result or to a circumstance described by a statute defining an offense," recklessness requires the person to be "aware of and consciously disregard[] a substantial and unjustifiable risk that the result will occur or that the circumstance exists," and criminal negligence requires that the person "fail[] to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists." *Id*. Child abuse can be committed intentionally, knowingly, recklessly, or with criminal negligence. § 13-3623.

¶16 Here, the trial court refused to give the lesser-included instructions Audra had requested because it concluded that neither the state nor Audra had presented evidence of reckless or negligent child abuse. The trial court stated there were "clearly" only three possible scenarios: that one or both defendants intentionally or knowingly had abused A., that her injuries had been accidental, or that A. had suffered from TBBD. But if the jury believed Martin was the abuser and Audra the custodian who had failed to act, the evidence also supported a finding that Audra had acted merely recklessly, by consciously disregarding a known risk the abuse was occurring, or negligently by failing to discover the abuse when a reasonable person would have done so.

¶17 The state presented testimony that Audra repeatedly had sought medical attention for A. and that doctors, who had conducted a series of tests designed to detect child abuse, had themselves overlooked a skull fracture and had not determined A. was the victim of child abuse when she was one month old. Despite all her fractures, A.'s treating physician testified there was no bruising associated with the fractures. And she and another physician testified that A.'s fractures could have occurred without bruising or other outward signs of injury. Finally, Audra testified that although she was A.'s primary caregiver, Martin sometimes cared for A. when Audra went to the store or was asleep.

¶18 From this evidence, the jury reasonably could have concluded Audra neither had known about the abuse nor had intended it, but rather that she had acted with a reckless or criminally negligent state of mind in either permitting so many different fractures to go undiagnosed and untreated for weeks or disregarding a known risk that the child's injuries, as they began to emerge, had been inflicted by Martin.[5] Accordingly, we conclude the trial court erred when it refused Audra's request for the lesser-included instructions on all counts and that Audra suffered prejudice by that refusal. *See State v. Detrich*, 178 Ariz. 380, 383-84, 873 P.2d 1302, 1305-06 (1994) (jury rationally could have found defendant lacked

[5]The fact that Audra did not urge the jury to accept any theory of lesser culpability but rather focused on persuading the jury that the child suffered from TBBD does not preclude her from seeking the lesser-included instructions, nor does it alter our analysis. *See State v. Wall*, 212 Ariz. 1, ¶ 25, 126 P.3d 148, 152 (2006) (defendant who employs "all-or-nothing defense" not precluded from lesser-included offense instruction if evidence supports giving it).

requisite intent for kidnapping; entitled to lesser-included for unlawful imprisonment); *Dugan*, 125 Ariz. at 196, 608 P.2d at 773 (jury might believe part of cashier's story and part of defendant's, fail to find element of fear had been established, and find him guilty of theft and not robbery).

EXPERT TESTIMONY

¶19 Audra argues the expert testimony on battered child syndrome exceeded the scope of admissibility under Rules 702 and 704, Ariz. R. Evid., 17A A.R.S., and invaded the province of the jury to decide an ultimate issue in the case. We review a trial court's ruling admitting expert testimony for an abuse of discretion. *State v. Graham*, 135 Ariz. 209, 212, 660 P.2d 460, 463 (1983). Qualified expert witnesses may give opinions that assist the jury in understanding evidence or determining facts, even when those opinions embrace the ultimate issue in the case. *See* Ariz. R. Evid. 702, 704.

¶20 Before trial, Audra moved the court to preclude the expert testimony about battered child syndrome, but the court allowed the testimony, finding it would assist the jury in understanding the evidence and determining material facts. The court ruled the state's expert could testify about what the syndrome is, what conditions would lead to its diagnosis, and whether the expert would hypothetically reach a diagnosis of battered child syndrome based on the evidence in this case. The court precluded the expert from testifying that A. was subjected to child abuse, was a victim of battered child syndrome, or that Audra or Martin had committed child abuse or had acted intentionally.

¶21 "Battered child syndrome has become an accepted medical diagnosis." *State v. Moyer*, 151 Ariz. 253, 255, 727 P.2d 31, 33 (App. 1986). The diagnosis, usually used in connection with children under the age of four, is "that a child of tender years found with a certain type of injury has not suffered those injuries by accidental means, but rather is the victim of child abuse." *Id*. Here, Dr. Binkiewicz testified that, in her medical opinion, a child with A.'s background and injuries "would be very highly likely to be a battered child."

¶22 While Audra concedes "the expert could properly explain the elements of battered child syndrome to help jurors understand the amount of force needed to fracture a healthy bone and to determine whether the bone was healthy," she contends the expert testimony here exceeded that scope and invaded the province of the jury. *State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986) (experts exceed scope of rules if they testify about witness credibility, belief in guilt or innocence, or how jury should decide case). But the admission of expert testimony on battered child syndrome in child abuse cases, for the same purposes it was admitted here, is well established in Arizona.[6] *See State v. Hernandez*, 167 Ariz. 236, 239, 805 P.2d 1057, 1060 (App. 1990) (testimony admitted because jury "lacked medical expertise to determine whether the child's injuries were more likely to have been accidentally or intentionally inflicted"); *Moyer*, 151 Ariz. at 255, 727 P.2d at 33 (testimony admitted because child unable to testify about cause of injuries); *State v.*

[6]Audra emphasizes *Moyer* and *Hernandez* involved a Rule 403 analysis to determine whether the evidence was more probative than prejudicial. *See* Ariz. R. Evid. 403, 17A A.R.S. However, we still find persuasive the admission of the testimony in those cases.

Poehnelt, 150 Ariz. 136, 150, 722 P.2d 304, 318 (App. 1985) (testimony admissible to establish injuries intentional not accidental); *State v. Turrubiates*, 25 Ariz. App. 234, 238, 542 P.2d 427, 431 (1975) (mentioning without comment admission of expert testimony on battered child syndrome, noting it "established a reasonable inference that the child died as a result of a criminal agency").

¶23 Audra complains the doctor's opinion, based on hypothetical injuries, surpassed the scope of permissible expert opinion because it was "so fact-specific to the Talmadges' case." Our courts, however, have allowed experts testifying about battered child syndrome to opine that the particular child in that case suffered from the syndrome. *See Hernandez*, 167 Ariz. at 239, 805 P.2d at 1060; *Moyer*, 151 Ariz. at 255, 727 P.2d at 33. Therefore, we find no error in the admission of expert testimony, even if the hypothetical questioning resulted in a constructive diagnosis that A. suffered from battered child syndrome.[7]

SUFFICIENCY OF EVIDENCE

¶24 Audra argues there was insufficient evidence both that A.'s skull fractures were inflicted under circumstances likely to produce death or serious physical injury and that Audra did not timely seek medical treatment for A.'s other injuries, and therefore, the trial

[7]Audra vaguely asserts the jury may have given undue weight to Binkiewicz's testimony because she was an expert on child abuse. But the jury was instructed to do otherwise. We presume jurors follow the court's instructions. *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996).

court erred by denying her motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., 17 A.R.S.[8] Under that rule, a court shall enter judgment for the defendant "if there is no substantial evidence to warrant a conviction." *Id*. "Substantial evidence is proof that a rational trier of fact could find sufficient to support a conclusion of guilt beyond a reasonable doubt." *State v. Greene*, 192 Ariz. 431, ¶ 12, 967 P.2d 106, 111 (1998).

¶25 Audra and Martin were convicted of two counts of child abuse "under circumstances likely to produce death or serious physical injury." § 13-3623(A). "Likely" under the statute means "probably," not just potentially. *State v. Greene*, 168 Ariz. 104, 108, 811 P.2d 356, 360 (App. 1991). Three of the state's medical experts testified at trial that severe skull fractures can cause a great risk of brain injury. There was evidence that A.'s skull fractures were very severe, that it takes substantial force to fracture an infant's skull as A.'s had been fractured, and that A. was fortunate to not have sustained a brain injury. One doctor testified a brain injury resulting in death could likely happen from the fractures A. had sustained. Based on this testimony, the jury reasonably could have concluded that A.'s

[8]Audra also argues the trial court erred by denying her pretrial motion to dismiss the allegations that the offenses occurred under circumstances likely to cause serious injury or death because there was no evidence A.'s life was threatened, nor did her injuries meet the statutory definition of serious physical injury. However, her motion was made pursuant to Rule 16.6(b), Ariz. R. Crim. P., 16A A.R.S., which provides for dismissal only if the court finds "that the indictment, information, or complaint is insufficient as a matter of law." Therefore, we address Audra's argument the evidence was insufficient as part of her argument made pursuant to Rule 20, Ariz. R. Crim. P., 17 A.R.S. *See State v. Rickard-Hughes*, 182 Ariz. 273, 275, 895 P.2d 1036, 1038 (App. 1995) (dismissal based on insufficient evidence only proper under Rule 20).

skull fractures had been inflicted in a manner likely to produce death or serious physical injury.

¶26 Audra and Martin were convicted of five counts of causing or permitting A. to be placed in a situation where her person or health had been endangered by their failure to seek medical treatment for her fractures. There was evidence A. had missed medical appointments and that Audra arguably had made inconsistent statements to family and friends who had seen bruises on A. And, the day before A. was hospitalized for the last time, when doctors concluded she had been abused, there was evidence that A. had been in obvious pain but Audra had not immediately taken her to the doctor. From this evidence, a reasonable jury could have concluded Audra had placed A. in a situation where her person or health had been endangered.

¶27 Moreover, this court has held that expert testimony that a child is the victim of battered child syndrome coupled with proof that the injuries happened while the child was in the defendant's care, is sufficient evidence from which a jury may infer the defendant was guilty of child abuse. *See Hernandez*, 167 Ariz. at 239, 805 P.2d at 1060; *Moyer*, 151 Ariz. at 255, 727 P.2d at 33.

OTHER ARGUMENTS

¶28 Audra argues the trial court erred when it admitted evidence of Martin's other acts and that after admitting the evidence against Martin, the court erred when it denied her motion to sever her trial from Martin's. Because even subtle changes in either the

prosecution or defense strategy at a subsequent trial could fundamentally alter the legal analysis necessary to resolve these issues, we do not address them in this appeal. Similarly, because Audra's claims of juror and prosecutorial misconduct involve discrete incidents not likely to recur in a new trial, we likewise decline to address them. *See State v. Diaz*, 166 Ariz. 442, 444, 803 P.2d 435, 437 (App. 1990), *vacated in part on other grounds*, 168 Ariz. 363, 813 P.2d 728 (1991) (when case remanded for new trial appellate court only considers remaining issues "likely to recur on retrial").

DISPOSITION

¶29 Audra's convictions are reversed, and this matter is remanded for proceedings consistent with this decision.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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PHILIP G. ESPINOSA, Judge